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No. 85-1369

In The

Supreme Court of the United States

October Term, 1985

BERNARD ZOLDESSY,

Petitioner,

vs.

FOUNDERS TITLE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Petitioner overstates the scope of the questions presented for review by advancing Seventh Amendment issues not previously asserted or considered by the Eleventh Circuit. The principal question presented for review is:

When does the statute of limitations accrue for a civil RICO claim?

LIST OF PARTIES

Plaintiff-Petitioner:

Bernard Zoldessy

Additional Party Plaintiffs:

Umphrey H. Bowling, Jr.
Harold Williams

Defendant-Respondent:

Founders Title Company

Additional Defendants:

J. R. Buderus
The Buderus Family Trust

Affiliated Companies of Founders Title Company:

Old Republic International Corporation
Old Republic Insurance Company
Capitol Fire & Marine Insurance Co.
Brummel Bros., Inc.
Chicago Underwriting Group, Inc.
Insured Credit Services, Inc.
Phoenix Aviation Managers, Inc.
Trade Insurance Services, Inc.
American Business & Mercantile Insurance Mutual, Inc.
American Treaty Management Corporation
Sirra Reinsurance Services, Inc.
American Business and Mercantile Insurance Group, Inc.
Reliable Life Insurance Company
Title Insurance Company of Minnesota
Mississippi Valley Title Insurance Co.
Founders Title Group
J. Huell Briscoe & Associates, Inc.
Actuarial Risk Services, Inc.
Church Rickards, Whitlock & Co., Inc.
Equi-Data, Inc.
Financial Insurance Management Corp.
Ganis Corporation
The HDH Group, Inc.
Insured Financial Services, Inc.
Old Republic Home Protection Co., Inc.
Residual Value Management Corporation
WNC Insurance Service, Inc.

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REPORTS AND OPINIONS DELIVERED BELOW

The Appendix to the Petition contains an accurate citation to the opinions delivered by the District Court and Court of Appeals. The opinion of the Eleventh Circuit is now reported at 733 F.2d 1175.

JURISDICTION

With the exception of the references to abridgement of Seventh Amendment rights which have not previously been asserted, the Petitioner accurately states his allegations of jurisdiction in the Petition for Writ of Certiorari.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner accurately recites the constitutional and statutory provisions involved with the exception of the reference to the Seventh Amendment to the Constitution of the United States which has not been the subject of any prior issues considered by the District Court or the Court of Appeals.

———o———

STATEMENT OF THE CASE

The Petitioner's factual recitation of the course of the legal proceedings and the factual background predating the filing of the original action is accurate—but is incomplete. Since the decision by the Eleventh Circuit is postulated, in large measure, upon facts adduced at trial, clarity of the issues requires portrayal of a more comprehensive factual background.

Founders Title Company ("Founders"), a title company domiciled in California, found itself enmeshed, in what the Eleventh Circuit subsequently characterized as

a "supporting role", in a scheme concocted by a California land developer, J. R. Buderus, to acquire large tracts of land in the Southern United States. Through contacts initiated with various real estate brokers, such as the plaintiffs Umphrey Bowling and Harold Williams, Buderus entered into a large number of agreements to acquire tracts of land. Zodessy, the owner of a farm in Greene County, Alabama, entered into a sales agreement with Buderus in the Spring of 1981. The closing of the sale was to occur on November 30, 1981.

The Zoldessy sales agreement, as did all other sales contracts, recited that the down payment would be made in the form of "Earnest Money Time Drafts". Buderus explained to the brokers and sellers that he had certificates of deposit which did not mature until November 30, 1981 and that he did not want to cash in these CD's and thus lose accrued interest. According to Buderus the CD's would be assigned to the escrow holder as collateral for the Time Drafts.

Founders' involvement in these transactions began in early 1981 when it agreed to serve as an intermediate depository for the various instruments of sale, including the Earnest Money Time Drafts. Beginning in early July 1981 Buderus began depositing with Founders various of the sales agreements and the Earnest Money Time Drafts including the Time Draft utilized in connection with the Zoldessy proposed sale. Although vigorously disputed by Founders, the evidence presented at trial reflected that telephone calls were placed to Founders in the Summer and early Fall of 1981 by various of the brokers and sellers who inquired about the legitimacy of the transactions.

Zoldessy testified that he was advised in a telephone call to Founders in the latter part of August 1981 that Founders had the "funds" to back up the Earnest Money Time Drafts.

The scheme of Buderus began to unravel in November and December of 1981. The closing of the Zoldessy sale which, by the terms of the sales agreement, was to occur on November 30, 1981 did not transpire. Buredus advised all sellers by letter dated November 30, 1981 that an "impassible and unsolvable" point had been reached necessitating the termination of the sales agreements. In this letter Buderus further advised that the escrow being held by Founders was being immediately cancelled.

Zoldessy's broker, Bowling, wrote to Zoldessy on December 16, 1981, expressing the opinion that the sale was "dead" and urging him to immediately file suit against Buderus for his wrongful acts. Less than one week later, on December 22, 1981, Zoldessy wrote to Buderus stating that he had been "damaged" as a result of Buderus' actions. On that same date, Zoldessy corresponded with Founders stating that he had received information that Founders "may be requested to terminate . . . [the] escrow and deliver the Time Drafts to the buyer" and demanding that the Time Drafts remain in the possession of Founders. Finally, in early January 1982 Zoldessy received a copy of a letter from Bowling to Buderus dated January 9, 1982 in which Bowling accused Buderus of wrongdoing and threatened legal action.

Zoldessy's suit against Founders and Buderus was initially filed on March 29, 1983. The Eleventh Circuit concluded that Zoldessy had learned by mid-January 1982

that he "had been deceived" and thus his action was time barred since it was not filed within one year thereafter.

ARGUMENT FOR DENYING THE WRIT

Contrary to the assertions of the Petitioner, the issues for review are neither unique nor involve inconsistency in decisions between courts of appeals. Rather, the Eleventh Circuit applied longstanding and well accepted legal principles in reaching its ultimate conclusion. The Appeals Court decision was buttressed by its reliance on similar conclusions reached by both the Eighth and the Ninth Circuit Courts of Appeals.

There should be no dispute between the Petitioner and the Respondent with respect to several of the constituent elements of the statute of limitations issue. First, the parties are in agreement that since Congress elected not to specify a period of limitation in promulgating RICO, federal courts must apply the most closely analogous state statute of limitations. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). Second, the most similar state statute of limitations is Alabama's one year fraud statute. Section 6-2-39 Code of Alabama 1975. Third, while state law determines the time period for purposes of application of statutes of limitation, federal law is determinative of the accrual date of the limitation period. *Rawlings v. Ray*, 312 U.S. 96, 61 S.Ct. 473, 85 L.Ed. 605 (1941); *McWilliams v. Escambia County School Board*, 658 F.2d 326 (5th Cir. Unit B 1981).

The Petitioner's disagreement with the Eleventh Circuit's opinion relates solely to the accrual date of the period of limitations. The Petitioner seizes upon isolated language in the Eleventh Circuit opinion wherein the court observed that Zoldessy learned that he had "been deceived" by mid-January 1982 and the Petitioner argues that the use of such terminology constitutes a retrenchment from the court's earlier finding that the accrual date is triggered by discovery of "injury". Petitioner is simply quibbling with semantics.

The federal test for determining the date of accrual of a tort cause of action is a reaffirmation of the traditional common law principle that a tort claim accrues when the conduct that invades the rights of another has caused injury. See e.g. *United States v. Kubrick,* 444 U.S. 111, 62 L.Ed.2d 259, 100 S.Ct. 352 (1979). The Eleventh Circuit expressly recognized this traditional accrual test when it observed in its opinion that with respect to a civil RICO claim "the statute of limitations begins to run when a plaintiff knows or should know of the injury". This was the same rule recognized in the context of a RICO claim by the Ninth Circuit in *Compton v. Ide,* 732 F.2d 1429 (9th Cir. 1984) which was relied upon by the Eleventh Circuit in reaching its decision. This same test is implicit in the finding by the Eighth Circuit in *Alexander v. Perkin Elmer Corp.,* 729 F.2d 576 (8th Cir. 1984) although the Eighth Circuit's decision speaks in terms of the accrual commencing upon the date of the discovery by the aggrieved plaintiff of the "controlling facts".

It is true, as alleged by the Petitioner, that not every federal decision addressing the accrual issue embodies the talismanic wording "injury". The absence of a reference

to the date of "injury" does not mean, however, that there is a conflict among the courts on this point. Rather, it is simply indicative of the employment by the courts of different verbage to express the same rule.

The reference in the Eleventh Circuit's opinion that Zoldessy learned that he had "been deceived by mid-January 1982" is by no means inconsistent with the court's earlier expression that the statute of limitations begins to run when a plaintiff "knows or should know of the injury." In the context of this case, discovery by Zoldessy that he had been deceived is synonymous with discovery of injury to his rights and his property. Nor is the Eleventh Circuit's conclusion about the date of the discovery of the deception unsupported by the evidence in the record as argued by the Petitioner.

The evidence presented at trial established, without dispute, that by mid-January 1982 Zoldessy had learned that the escrows had been cancelled and the sales agreements terminated, had been advised by his broker that the sale was dead, had been urged to file suit against Buderus for his wrongful acts, and had advised Buderus that he had been *damaged* as a result of Buderus' actions. How can the Petitioner now assert any error by the Eleventh Circuit when he has categorically acknowledged sustaining "damage" more than one year prior to institution of his legal proceeding?

The Eleventh Circuit decision represents nothing short of a strict adherence to time honored principles concerning the accrual date of a tort cause of action. The opinion is consistent with similar decisions reached by other courts of appeals and the court's ultimate conclu-

sion is supported by the evidence in the record. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT A. HUFFAKER
Attorney for Respondent
Founders Title Company